

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7100

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-7100

DRYS SHIPPING CORPORATION,
Plaintiff-Appellee,
against

FREIGHTS, SUB-FREIGHTS, CHARTER
HIRE AND/OR SUB-CHARTER HIRE OF
THE M.S. DRYs,

and

A/S FALKEFJELL AND A/S DOVREFJELL,
Defendants-Appellants,
and

ATLANTIC AND GREAT LAKES STEAMSHIP
CORPORATION,
Garnishee-Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANTS-APPELLANTS

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants-Appellants
A/S FALKEFJELL AND A/S DOVREFJELL
One State Street Plaza
New York, New York 10004
(212) 344-6800

DONALD J. KENNEDY
of Counsel

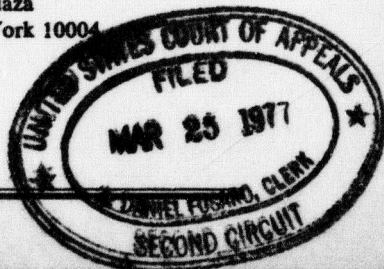


TABLE OF CONTENTS

	PAGE
Introduction	1
POINT I—Jurisdiction	2
POINT II—Arbitration Act—Chapter 1	6
POINT III—Arbitration Act—Chapter 2	9
POINT IV—The Lien	11
Conclusion	13

TABLE OF AUTHORITIES

Cases	PAGE
<i>American Mortgage Corp. v. First National Mortgage Co.</i> , 345 F.2d 527 (7th Cir. 1965)	4
<i>The Bremen v. Zapata Off-Shore Co.</i> , 407 U.S. 1 (1972)	3, 8, 12, 13
<i>Cohen v. Beneficial Industrial Loan Corporation</i> , 337 U.S. 541 (1949)	3
<i>Compania Naviera Asiatic, S.A. v. Burmah Oil Co.</i> , 1975 A.M.C. 2667 (S.D.N.Y. 1975)	14
<i>De Lovio v. Boit</i> , 7 Fed. Cas. 418, No. 3,776, 2 Gall. 398	6
<i>Financial Services Inc. v. Ferrandina</i> , 474 F.2d 743 (2d Cir. 1973)	4
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972)	14
<i>Iran Express Lines v. Sumatrop, A.G.</i> , 1976 A.M.C. 2082, 2085 (D.Md. 1976)	7
<i>Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc. WOR Division</i> (Docket No. 76-7430, 2d Cir., March 3, 1977)	2, 3
<i>McCreary Tire & Rubber Company v. CEAT S.p.A.</i> , 501 F.2d 1032 (3rd Cir. 1974)	9, 10
<i>Metropolitan World Tanker Corp., et al. v. P.N. Pertamina-bangan Minjakdangas Dumi National (P.M. Pertamina)</i> , 1976 A.M.C. 421 (S.D.N.Y. 1976)	9 10
<i>Mitchell v. W. T. Grant</i> , 416 U.S. 600 (1974)	14
<i>North Georgia Finishing, Inc. v. Di-Chem, Inc.</i> , 419 U.S. 601 (1975)	14
<i>The Sanko Steamship Co., Ltd. v. Newfoundland Refinery Company, Ltd., et al.</i> , 411 F.Supp. 285, 1976 A.M.C. (S.D.N.Y. 1976); aff'd without opinion 538 F.2d 313 (2d Cir. 1976); petition for rehearing en banc denied June 3, 1976 (Docket 76-7060); cert. denied, 45 L.W. 3253	8, 9
<i>Scherk v. Alberto-Culver Co.</i> , 417 U.S. 506 (1974)	3, 11

	PAGE
<i>Schoenamsgruber v. Hamburg American Line</i> , 294 U.S. 454 (1935)	5
<i>Seawind Compania S.A. v. Crescent Line, Inc.</i> , 320 F.2d 580, 581-82 (2d Cir. 1963)	7
<i>Sniadach v. Family Finance Corp.</i> , 395 U.S. 337, 341 (1969)	14
<i>Swift & Company Packers et al. v. Compania Colombiana Del Coribe, S.A. et al.</i> , 339 U.S. 684 (1949)	5
<i>Tradax Limited, et al. v. M.V. "Holdendreht", etc., and N.V. Stoomvaart Maatschappij De Maas and Phs. Van Ommeren, N.V.</i> , (Docket No. 76-7346, 2d Cir., March 15, 1977)	5
<i>Trefalgar Shipping Co. v. International Milling Co.</i> , 401 F.2d 568 (2d Cir. 1968)	13

Statutes Cited

Arbitration Act, Title 9 U.S.C.

Section 1-14	9
Section 8	8, 9, 10
Section 201-208	9
Section 208	9, 10
Federal Rules of Civil Procedure	
Supplemental Rule B(1)	8, 9
28 United States Code	
Section 1292	5

Other Authorities Cited

2 Benedict on Admiralty, 6th Ed., § 288, p. 346	7
4 Benedict on Admiralty cc. 61-63 (Knauth ed. 1940)....	6
Lowenfeld, "International Private Trade", § 4.31 and § 4.32	11, 12
Sommer, Richard H., "Maritime Arbitration—Some of the Legal Aspects", 49 Tul.L.Rev. 1035, 1040-41 (1975)	8

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7100

DRYS SHIPPING CORPORATION,

Plaintiff-Appellee,

against

FREIGHTS, SUB-FREIGHTS, CHARTER
HIRE AND/OR SUB-CHARTER HIRE OF
THE M.S. DRYs,

and

A/S FALKEFJELL AND A/S DOVREFJELL,

Defendants-Appellants,

and

ATLANTIC AND GREAT LAKES STEAMSHIP
CORPORATION,

Garnishee-Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANTS-APPELLANTS

INTRODUCTION

This brief is submitted on behalf of Defendants-appellants (hereinafter Charterers) in reply to the brief of plaintiff-appellee (hereinafter Owners). Owners devote a substantial portion of their brief to a treatment of the facts of the case. It should be pointed out, and the record below indicates, that the support for the facts in Owners' brief are the conclusory allegations in the complaint and affidavits of Owners' New York attorneys.

POINT I

JURISDICTION

Owners' discussion of jurisdiction in Point I of their brief repeats a number of points and refers to some of the same authorities referred to in their affidavit in support of the motion to dismiss. The arguments raised by Owners at pages 8 to 11 of their brief have been adequately addressed in Charterers' brief in opposition to the motion to dismiss the appeal.

(a) *Final Order.*

Owners argue that the District Court's order is not final because the possibility exists of additional proceedings in the District Court. Their argument has three aspects. One, the Charterers may renew the motion upon the showing of affidavits setting forth the unquestioned contractual intent of the parties or witnesses to that effect. Two, the District Court is to review and confirm the arbitrators' award, and three, there may be a requirement for the District Court to take action to compel Charterers to continue arbitration. The first two arguments which Owners have made have been considered in Charterers' brief submitted in opposition to the motion to dismiss at pp. 12-18. Charterers' third argument is rather unique because it assumes that the District Court has direct control over the arbitration proceedings under way in London. There is no support whatsoever in the Arbitration Act or in case law to support such a proposition. It does not require any citation of authority to support the proposition that the District Court in New York does not have the power to direct the internal procedures of the London arbitration proceedings. The arbitrators have ample and exclusive authority to impose appropriate sanctions on a party that obstructs or otherwise delays arbitration proceedings.¹

(b) *Collateral Doctrine Rule.*

The recent decision of this court in *Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc. WOR Division*, (2nd Cir. Docket No. 76-7430, decided March 3, 1977) has not pre-

¹ See, e.g., *Gilbert v. Burnstine*, 225 N.Y. 348 (1931).

viously been called to this court's attention and it is noteworthy in connection with the collateral doctrine rule. In *Local 771* the issue before the court was the exclusivity of an arbitration clause in the parties' collective bargaining agreement and whether the District Court's finding that the arbitration clause was non-exclusive was appealable.

In determining whether the order from which the appeal was taken met the *Cohen* criteria, the court found:

1. The interpretation of the arbitration provisions of the collective bargaining agreement presents an issue that is separable from and collateral to the main issue in the case... p. 2170

2. The Company's claim that the district court's decision violated the national labor policy in favor of minimum judicial intervention and exclusivity of arbitration conducted under the terms of labor agreements (citation omitted), unquestionably presents an important question, the gravity of which is emphasized by the similarity of the arbitration provisions in the Agreement at issue to the "standard form". (citation omitted) pp. 2170-71

3. Finally, the Company's right to be relieved of the costs and delays of trial, which it claims to have gained through the contract's arbitration provision, will be lost irretrievably if proceedings in the case go forward in the district court. p. 2171

Applying these principles to the case at bar, it is, first of all, manifest that the case involves the interpretation of the arbitration provision in the charter party. Second, we submit that the decision of the District Court is in violation of the policy of the Supreme Court pertaining to the enforcement of forum selection/arbitration provisions in international contracts as set forth in the *Bremen* and *Scherk* decisions.² Third, the parties

² The arbitration clause in question is a standard clause in the New York Produce Exchange Form Charter Party, one that is widely used in international commerce.

are entitled to be free from the cost and delays of litigation. In this case, expense considerations are particularly acute since the parties are already at arbitration.³

(c) *Denial of Injunction.*

Owners argue that Charterers cannot bring their appeal under 28 U.S.C. § 1292, citing *Financial Services Inc. v. Ferrandina*, 474 F.2d 743 (2d Cir. 1973) and *American Mortgage Corp. v. First National Mortgage Co.*, 345 F.2d 527 (7th Cir. 1965). In *Financial Services Inc.*, the defendant, after losing a motion to vacate an attachment, commenced a separate action for a preliminary injunction to restrain the U.S. Marshal from enforcing an order of attachment. This court recognized that although the relief denied was injunctive in form, it was "no more than a motion to vacate the attachment in the first action by another name", 345 F.2d 743, 745. It was on that basis that the court denied the appeal. In *American Mortgage* an attachment was obtained against defendants and their motion to dismiss the attachment was denied. On appeal, the defendants argued that the attachment should be treated as a temporary injunction and an appeal is proper by analogy. The court rejected that argument as specious.

Charterers in this case, however, are not attempting to characterize the attachment order as an injunction. In the District Court, Charterers specifically requested injunctive relief by asking that:

"An order be entered restraining Owners from further attempting to exercise liens pursuant to Clause 18 of the charter party for charter hire, damage repair costs and expenses incidental thereto allegedly incurred to date which are the subject of the London arbitration proceedings."

The relief which was requested and which was denied was injunctive relief because Charterers were aware that if they were successful in vacating the attachment in this proceeding,

³ See discussion of this point *infra*, pp. 13-15.

they could still be subject to similar harassing attachments in other jurisdictions unless Owners were ordered by the court to cease such attempts.

Owners, in support of their argument that the appeal does not come under 28 U.S.C. § 1292, rely upon this court's decision of March 15, 1977, in *Tradax Limited, et al. v. M.V. "Holdendrecht", etc., and N.V. Stoomvaart Maatschappij De Maas and Phs. Van Ommeren, N.V.*, Docket No. 76-7346 (2d Cir. 1976). In *Tradax*, the question before this court was whether an order from the District Court staying an admiralty case pending arbitration was appealable. This court found that the order was not appealable relying upon the authority of *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935). In both *Schoenamsgruber* and *Tradax* the court stayed proceedings pending arbitration. In the instant case, the express purpose of the proceedings was solely to obtain security in New York for the London arbitration proceedings (Charterers' brief in opposition of motion to dismiss the appeal, pp. 10 and 11), and no stay has been requested or granted.

Charterers by referring to *Tradax*, apparently are arguing that a District Court in an admiralty proceeding does not have the power to grant injunctive relief and therefore in this case injunctive relief could not have been denied.

Owners' apparent contention that admiralty courts do not have equitable jurisdiction is somewhat surprising in view of the fact that they have referred this court both in their motion papers and in their brief to the Supreme Court's decision in *Swift & Company Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950). In *Swift* one of the issues before the court was whether the District Court had the power to determine whether the transfer of a vessel was fraudulent. Justice Frankfurter stated:

"The issue of fraud arises in connection with the attachment as a means of effectuating a claim incontestably in admiralty. To deny an admiralty court jurisdiction over this subsidiary or derivative issue in a litigation clearly

maritime would require an absolute rule that admiralty is rigorously excluded from all contact with nonmaritime transactions and from all equitable relief, even though such nonmaritime transactions come into play, and such equitable relief is sought, in the course of admiralty's exercise of its jurisdiction over a matter exclusively maritime. It would be strange indeed thus to hobble a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce. Controversies between admiralty and common law are familiar legal history. See Mr. Justice Story's classic opinion in *De Lovio v. Boit*, 7 Fed. Cas. 418, No. 3,776, 2 Gall. 398; 4 Benedict on Admiralty cc. 61-63 (Knauth ed. 1940). We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction. Certainly there is no ground for believing that this restriction was accepted as a matter of course by the framers of the Constitution so that such sterilization of admiralty jurisdiction can be said to have been presupposed by Article III of the Constitution."

POINT II

ARBITRATION ACT—CHAPTER 1

As noted in Charterers' brief (pp. 3-4), 9 U.S.C. § 8 permits a party claiming to be "aggrieved" to begin his proceeding by libel and seizure. The court then has "jurisdiction to direct the parties to proceed with the arbitration...." Section 8 further instructs that "the court shall retain jurisdiction to enter its decree upon the award."

Owners do not argue that they began their proceedings in the manner prescribed in Section 8. The record is clear that Owners instituted arbitration proceedings in London in March 1976, and thereafter commenced this action in New York

merely for the purpose of obtaining security for an eventual London arbitration award (107 a). The court below recognized that "since the plaintiff has not begun his action with the attachment but rather is seeking merely to insure his recovery on an award, the attachment does not appear to be valid under a literal reading of 9 U.S.C. § 8." (23 a). But the court then asked:

Practically speaking, what difference is there in allowing this attachment to continue although the action is stayed? Under Section 8 the court retains jurisdiction to enter a decree upon the arbitration award so the attachment would be available for that purpose. (24 a).

Charterers respectfully submit that both the court below and the Owners misconstrue the interplay between jurisdiction and security in admiralty proceedings. It is well settled that the purpose of an attachment under Supplemental Rule B(1) is twofold: 1) to obtain *in personam* jurisdiction over the defendant through his property, and 2) to provide security for any decree in favor of the plaintiff. *Seawind Compania S.A. v. Crescent Line, Inc.*, 320 F.2d 580, 581-82, (2d Cir. 1963); *Iran Express Lines v. Sumatrop, A.G.*, 1976 AMC 2082, 2085 (D.Md. 1976). It is similarly well settled, and this court has recognized, that the two purposes may not be separated and "security may not be obtained except as an adjunct to jurisdiction." (emphasis supplied). *Seawind Compania*, *supra*, p. 582; *Iran Express Lines*, *supra*, p. 2085. See 2 *Benedict on Admiralty*, 6th Ed., § 288, p. 346. Thus if a defendant can be found within the district, for example, the plaintiff is not entitled to a maritime attachment, even though the defendant is likely to be completely insolvent by the end of the litigation. In *Iran Express Lines*, a recently reported lower court case which follows *Seawind*, the court held that under Supplemental Rule B, the filing of a general appearance by a defendant before any effective attachment of his property nullified any subsequent attachment. On the other hand, if the attachment is necessary for jurisdictional purposes, the plaintiff may retain the benefit of the security even if the defendant subsequently appears.

Viewed in this light, the requirements of 9 U.S.C. § 8 that an aggrieved party *begin* his proceeding by libel and seizure in order to obtain security for an arbitral award is perfectly consistent with the procedure under Supplemental Rule B.⁴ The purpose of the seizure under Section 8 is to vest the court with "jurisdiction to direct the parties to proceed with the arbitration . . ." As an adjunct to this jurisdictional purpose, the court "shall retain jurisdiction to enter its decree upon the award."

In the case at bar, there is clearly no point in the District Court exercising jurisdiction to direct the parties to arbitration. Apart from the procedures specifically set out in the Arbitration Act, the decisions in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and *Sanko Steamship Co. v. Newfoundland Refining Company Ltd.*, 411 F.Supp. 285 (S.D.N.Y. 1976) aff'd without opinion 538 F.2d 313 (2d Cir. 1976) cert. den. 45 U.S.L.W. 3253, U.S. (1976) would preclude the District Court from exercising jurisdiction over this dispute in the face of a valid arbitration agreement.⁵ Therefore, any exercise of jurisdiction by the District Court at this point would be for the sole purpose of providing security for Owners. In other words, jurisdiction would be exercised as an adjunct to security instead of vice-versa. This result is not permissible either under Supplemental Rule B or under the plain language of 9 U.S.C. § 8.⁶

⁴ One may well ask what is the practical difference between beginning an admiralty proceeding by a seizure and obtaining an attachment after the defendant has appeared. The difference, of course, is that in the latter instance, the attachment is purely for security purposes.

⁵ Both the court below and the appellee concede this point. See Judge Goettel's opinion, p. 21 a.

⁶ See Sommer, Richard H. "Maritime Arbitration—Some of the legal Aspects," 49 Tul. L. Rev. 1035, 1040-1041 (1975). Mr. Sommer argues that although it is an open question whether security is available once the parties have embarked on arbitration, "the better view is that once the parties have proceeded with the arbitration, the obtaining of security fails since Section 8 is based upon the traditional admiralty procedure of in rem or attachment in order to obtain appearance."

To sum up, 9 U.S.C. §8, like Supplemental Rule B, allows the plaintiff the benefit of any security obtained in conjunction with a seizure for jurisdictional purposes. Where the seizure has no jurisdictional purpose, however, the attachment must fall.⁷

POINT III

ARBITRATION ACT—CHAPTER 2

The Arbitration Act, as amended, is divided into two chapters: Chapter 1 contains the General Provisions, 9 U.S.C. § 1-14 and Chapter 2 contains the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208. As noted in Charterers' brief (pp. 5-6), the Convention applies to the case at bar.

9 U.S.C. § 208 provides:

"Chapter 1 applies to actions and proceedings brought under this Chapter to the extent that Chapter 1 is not in conflict with this Chapter or the Convention as ratified by the United States."

Charterers' brief cites two cases in which resort to state attachment procedures was held to violate an arbitration agreement under the Convention. (Charterers' brief, pp. 6-9). In *McCreary Tire & Rubber Company v. CEAT S.p.A.*, 501 F.2d 1032 (3rd Cir. 1974), the Third Circuit distinguished the procedures under Chapter 1 of the Arbitration Act in reaching its conclusion.⁸ 501 F.2d at 1038. In *Metropolitan World Tanker Corp. v. P.N. Pertamina*, Menjakdangas Dume National (P.M. Pertamina) 1976 A.M.C. 421 (S.D.N.Y. 1976), Judge Motley, following *McCreary*, found that "there is no . . . indication that . . . pre-arbitration attachment is warranted under the Convention." 1976 A.M.C. at 423.

⁷ See *The Sanko Steamship Company*, *supra*, where the court reached the same conclusion under the New York State attachment procedures. The plaintiff in *Sanko* invoked the state procedures by way of Supplemental Rule B(1). Owner's statement that the attachment in *Sanko* was not pursuant to the Supplemental Rules is erroneous. (Owner's brief p. 31).

⁸ See Charterers brief, p. 7.

Owners, of course, seek to limit the applicability of *McCreary* and *Metropolitan World Tanker* to situations involving state attachment remedies. (Owners' brief, p. 35). The decisions themselves, which are predicated on the language and policy of the Convention, are not so limited.

Since Owners have not complied with the requirements of 9 U.S.C. § 8, this Court need not decide whether that section is inapplicable to arbitration agreements falling under the Convention by virtue of 9 U.S.C. § 208. In other words, this Court need not decide whether the Owners would be entitled to pre-award security under Section 8 if they had commenced this action *before* arbitration, or whether such a remedy would conflict with the policy and language of the Convention as articulated in *McCreary* and *Metropolitan World Tanker* and therefore be unavailable. If the Court does reach this issue, however, two further points should be noted.

First, the need for the pre-arbitration security has been drastically reduced since ratification of the Convention. An arbitration award under the Convention is now enforceable in the courts of any contracting state.⁹ Thus the prevailing party has the option of enforcing his award in any contracting state where the losing party has assets. This is a considerable improvement over the uncertainty of pre-Convention days and it obviates, to some extent, the security function of 9 U.S.C. § 8.

Second, there is ample evidence that the draftsmen of the Convention did not overlook the issue of security in arbitration. Article VI provides that a party who seeks to have an arbitration award set aside may be required to provide security.¹⁰ Article III provides for the enforcement of awards "in accord-

⁹ See Article III of the Convention.

¹⁰ Article VI: "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article v(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on enforcement of the award and may also, on the application of the party claiming enforcement of the award, *order the other party to give suitable security.*" (Emphasis added).

ance with the rules of procedure of the territory where the award is relied upon"

Significantly, however, no such provision is made for security prior to the rendering of an award. Article II § 3 only states:

"The court of a Contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Thus the language of the Convention supports the holdings in the *McCreary* and *Metropolitan World Tanker* cases that there is no authority for preaward security under the Convention and that an attempt to obtain such security violates the agreement to arbitrate.

POINT IV

THE LIEN

Owners attempt to sidestep the fact that the July 2nd Agreement does not give them a contractual lien on subfreights for amounts due under the charter. (Owners' brief, p. 20). The July 2nd Agreement incorporated two clauses of the charter party therein: Clause 5(72a) and Clause 17 (the arbitration clause) (73a). The parties did not specifically include the lien clause in the July 2nd Agreement, and the ancient Latin maxim *inclusio unius est exclusio alterius* bars any assertion that the lien clause was incorporated by implication. Therefore, since Owners based their claim on the July 2nd Agreement, no contractual lien arises.

In any event, the lien which Owners attempt to assert is a contract lien provided for in Clause 18 of the charter. As previously noted, disputes under the charter were to be resolved by arbitration in London pursuant to English law.¹¹ The briefs

¹¹ See *Scherk v. Alberto-Culver*, 417 U.S. 506, 519, n13; see also *Lowenfeld, International Private Trade*, §4.31.

of the parties indicate that there is a substantial and *bona fide* dispute as to Owners' right to assert such a lien under Clause 18. In these circumstances, where there is such a dispute under the charter party, the validity of the lien should be determined in the first instance by the arbitrators in accordance with English law and the intention of the parties as manifested in Clause 17 of the charter.

The Supreme Court in *Bremen* has recognized that when the parties to an international contract conduct their negotiations, the consequences of the forum clause figure in their calculations. (*Bremen*, 407 U.S. 1, 13-14) Under the British system, the arbitrators or one of the parties are authorized to "state a special case" and submit it to the High Court of Justice for review of legal issues. This procedure is a marked contrast from arbitration under American jurisprudence where the arbitration proceeds outside the framework of the judicial system.¹² In view of this procedure, there is a much stronger presumption that the law of the forum applies where there is a London arbitration provision than where there is a clause providing for United States arbitration.¹³ Moreover, in light of this comprehensive judicial review, there is much less risk in submitting questions of law, such as the contractual lien in the instant case, to the arbitrators.¹⁴

It should be noted that in the proceedings below, Charterers submitted into evidence expert opinion on English law in the form of an affidavit by a London solicitor. The essence of his opinion was that under English law the Owners were not entitled to a lien pursuant to the charter party.¹⁵ Owners have submitted no expert evidence on English law, and the only

¹² *Lowenfeld, supra*, §4.31 and §4.32.

¹³ *Ibid.*

¹⁴ In fact, it makes much more sense to submit the lien questions to the arbitrators in the first instance. As commercial men they may be more qualified than the District Court to determine whether a claim for alleged stevedore damage would give rise to a lien within the meaning of Clause 18. In deciding the lien issue, commercial arbitrators would consider all of the pertinent provisions of the charter in light of the custom of the trade.

¹⁵ 61a-69a; 131a-134a

evidence offered by Owners are the conclusory allegations contained in the complaint and the affidavit of Owners' New York attorney.

CONCLUSION

The selection of an arbitration forum is more than an incidental provision in an international contract. In view of modern litigation costs, choosing a forum for the resolution of all disputes under a contract is critically important to contracting parties in helping them assess their business costs and risks. As Chief Justice Burger suggested in *The Bremen*:

"The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." pp. 13-14 (407 U.S.)

Yet in the case at bar (which deals with a five-year contract containing a forum selection arbitration clause), Owners seek to undermine the true value of the forum selection provision by attaching Charterers' assets in various parts of the world. Although arbitration dealing with the underlying dispute is in progress in London, Charterers have been forced to come to the United States and then go to Holland to challenge the *ex parte* seizure of their assets by Owners. The litigation expenses, which Charterers hoped to minimize by submitting all disputes under the charter party to a single, neutral arbitration panel, will be enormous if Owners are permitted to follow Charterers across the globe in a never ending quest for security.¹⁶

¹⁶ In *Trafalgar Shipping Co. v. International Milling Co.*, 401, F.2d 568 (2nd Cir. 1968), this court recognized that the policy of the Arbitration Act is "to eliminate the expense and delay of extended court proceedings preliminary to arbitration." 401 F.2d at 572.

The alternative for Charterers is equally unsatisfactory. They may choose to save their litigation resources for the main dispute in London by allowing Owners' various attachments to go unchallenged. Gradually, however, as their cash flow is choked off, Charterers may be forced to capitulate and redeliver the vessel before the arbitration panel renders its award. In other words, the very resources which Charterers need to defend the main action will be denied to them before they have the opportunity to litigate the underlying dispute on the merits. CLL: *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341 (1969).

In recent years, Courts have become increasingly sensitive to due process considerations where a defendant's goods are seized or assets are attached before judgment.¹⁷ The due process issue is raised more starkly where the property interference occurs before the defendant has the opportunity to be heard. Although courts tend to be more indulgent of *ex parte* seizures where necessary to obtain jurisdiction over an absent defendant, they are far less indulgent where the seizure is purely for security purposes.

Moreover, one must truly question whether the opportunity to be heard is at all meaningful to a defendant with less than unlimited financial resources if one week that right must be exercised in New York, the next week in Holland, and the following week in London. If such a procedure is sufficient to satisfy the requirements of due process, it is also sufficient to drive all but the most well-heeled operators from the international marketplace. The value of the arbitration/forum selection provision in helping smaller businesses to limit their legal expenses will be wholly lost.

Attachment is a discretionary remedy and a court may properly refuse to grant an attachment even where the plaintiff has met all of the statutory prerequisites. In *Compania Naviera*

¹⁷ *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974); *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

Asiatic, S.A. v. Burmah Oil Co., 1975 A.M.C. 2667 (S.D.N.Y. 1975), Judge Frankel exercised his discretion to vacate a state attachment because to allow the attachment to stand against a defendant "tottering on the brink of financial ruin... might well force a settlement of the pending case before defendant had a chance to litigate on the merits." ¹⁸ p. 2668. In the circumstances of this case, where attachment is not sought for jurisdictional purposes and an arbitration proceeding dealing with the underlying merits of this case is in progress in London, it was clearly an abuse of discretion to refuse to vacate the plaintiff's attachment.

Dated: New York, New York
March 24, 1977

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants-Appellants
One State Street Plaza
New York, New York 10004
(212) 344-6800

DONALD J. KENNEDY
Of Counsel

¹⁸ Under the Supplemental Rules, a plaintiff may seek the provisional remedy of attachment either pursuant to state law or by the traditional writ of maritime attachment. However, there is no reason why a defendant's rights under an arbitration clause, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or under the Due Process clause of the Fifth Amendment to the United States Constitution should turn on the plaintiff's choice of procedural route.



PANDICK PRESS, Inc.

345 Hudson Street, New York, N.Y. 10014

(212) 741-5555

The **FINANCIAL PRINTER**

24604

Richard Repetto, Esq.
Donovan, Maloof, Walsh & Kennedy
161 William Street
New York, New York

Delivery of the following:

Maight Gardnar Poor & Havens

2 Copies of the Brief

RECEIVED

MAR 20 1971

DONOVAN, MALOOF
WALSH & KENNEDY

JOB No.

Received by R. Repetto

DATE

19 Floor

[Signature]



PANDICK PRESS, Inc.

345 Hudson Street, New York, N.Y. 10014

(212) 741-5555

The **FINANCIAL PRINTER**

24604

David A. Nourse, Esq.
Kirlin, Campbell & Keating
120 Broadway
New York, New York

Delivery of the following:

Haight Gardner Poor & Havens

2 Copies of the Brief

2 copies reply brief, rec'd by
COPY RECEIVED

MAR 20 1977

JOB No.

Received by

DATE

KIRLIN, CAMPBELL & KEATING

Signature